Cur. Adv. Vult.

Adams J.: This is an appeal by the appellant who had been convicted by the learned President, Sessions Court sitting as Magistrate at Muar of assisting in the management of the *Tikam Ekor Lottery* contrary to section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. There were many grounds of appeal, but Mr. Sault very wisely confined himself to one. I said I would allow the appeal but that I would give my reasons later.

The bare facts were that the accused was stopped while riding his bicycle in Muar Town and was stated to have dropped the exhibits P.2(a), (b) and (c) when he was stopped by the Police. These exhibits consist of minute pieces of scrap paper on which figures appear. Police Inspector Chew Ban Kee, an expert on the *Tikam Ekor Lottery*, deposed as follows:—

"I have been giving expert evidence *re* 10,000 character lottery and my evidence has been accepted by Johore Courts. I have examined Exs: P2(a), (b) and (c). P2(a) is a staking slip *re* 10,000 character lottery; P2(b) also staking slip containing 3 tickets and P2(c) also relates to big and small 10,000 character lottery containing 40 tickets depending on the draw on 23.7.61 which was a Turf Club meeting at Penang — i.e. 1st Penang Club race. I estimate the amount of stakes in the 3 exhibits $96. A person in possession of Exs. P2(a), (b) and (c) is a collector in my opinion."

It will be seen therefore that he does not explain how he comes by this opinion. The exhibits certainly do not look anything like the record of stakes shown in the book *Gambling Games in Malaya* by Dobree which is a recognized authority under section 24 of the Ordinance. Nor does he explain how one of the tiny exhibits contain 40 tickets. It may well be that the figures indicate that 20 bets have been placed against each of the two numbers. But it is for him to say so not for the Court to guess. Nor is there any explanation as to how he comes to the opinion that the record of stakes shows bets amounting to $96. That being the case, the learned Magistrate was in no position to be able to judge if the evidence of the expert was in fact acceptable. After all it is the learned Magistrate who is the person who has to decide whether or not the exhibits are or are not what the expert says they are, and to do this he must be able to see how the expert came by his opinion. In his otherwise excellent grounds of judgment the learned President finds as a fact that the exhibits are in fact a record of stakes, but he does not say why. The *Choo See Kean case* [1] emphasises the necessity for this. The learned Judge makes it clear that the evidence of the expert must be such that it enables the Magistrate to come to a decision. The evidence of the expert here does not do that. It is an *ex cathedra* pronouncement that the exhibits are record of stakes. This is probably due to lack of experience on the part of the prosecuting officer. The prosecuting officer must elicit the reasons for the opinion of the expert unless the document speaks for itself. When the reasons for the expert's opinion are given the learned Magistrate in his grounds of decision can say, 'I found as a fact that the exhibits were record of stakes in the *Tikam Ekor Lottery*, because from the evidence of the expert it is clear that the reasons that he gives for saying so are clear and unequivocal,' and no one could quarrel with him. The learned Magistrate can go further (again on the authority of *Choo See Kean's case*) and use his own knowledge gained in previous cases, and add that knowledge to the evidence of the expert by saying that the exhibits are identical to those used in other cases relating to the carrying on of the *Tikam Ekor Lottery* which confirms him in the opinion that the evidence of the expert is reliable.

I have dealt with this more fully in the case of *Sim Ah Oh* v. *Public Prosecutor* [2] and I do not want to repeat myself. The appeal must be allowed and the conviction quashed, any part of the fine if paid must be refunded, and the sum confiscated from the defendant also returned to him.

I think I should also say that the learned Magistrate ordered all the money on the defendant to be confiscated, some $496.50 although the evidence shows that only $96 was attributable to the lottery, and only that sum should have been confiscated. Section 407 of the Criminal Procedure Code only applies to property regarding which an offence has been committed. There was no evidence to show that the balance of $400.50 was connected with the commission of any offence.

Appeal allowed.

TAN WANG KENG v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) December 7, 1961]

[Johore Bahru — Criminal Appeal No. 30 of 1961]

Customs and Excise — Attempted export of opium — Dangerous Drugs Ordinance, 1952, ss.5(1) and 33 — Whether mens rea necessary — "Export" — Meaning of.

Appellant whilst driving his car, and after he had passed the customs station at Johore Bahru en route to Singapore, was stopped on the causeway in Johore territory and 270 lbs. of raw opium were found in his car. The learned President following the decision in *Public Prosecutor* v. *Lee Tuah Suah* [1] amended the charge from one of exporting to one of attempting to export under the Dangerous Drugs Ordinance, 1952 on the ground that before there could be any export, the goods must actually leave the territorial limits of the Federation.

It was argued for the appellant that as he was unaware of the existence of the opium in his car, he could not be found guilty of the offence charged because *mens rea* is a necessary element to the commission of an attempt to commit an offence.

Held: section 5 of the Dangerous Drugs Ordinance imposes an absolute prohibition against export of raw opium without licences and the absence of knowledge of the drug is no defence. Though in the normal meaning of the word "attempt" there must be the *actus reus* and the *mens rea*, it is not illogical to hold that where there is an absolute prohibition against the doing of an act, there may also be an absolute prohibition against the making of an attempt, without a requirement for *mens rea*. The appellant was therefore guilty of attempting

to export even if he did not know the opium was in his car.

Per Curiam: The law as to what constitutes "export" appeared to have been settled since 1948 following the judgment of Taylor J. in *Public Prosecutor* v. *Lee Tuah Suah*. The Court could therefore give no "ruling" on the matter.

Cases referred to:—

(1) *Public Prosecutor* v. *Lee Tuah Suah* [1948] M.L.J. 55.

(2) *Lim Eng Soon* v. *Public Prosecutor* [1953] M.L.J. 166.

CRIMINAL APPEAL.

S. K. Lee for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Adams J.: This was an appeal against the decision of the learned President, Sessions Court sitting at Johore Bahru whereby the appellant was convicted and sentenced to one year's imprisonment and a fine of five thousand dollars or in default a further fifteen months' imprisonment for an offence contrary to sections 33 and 5(1) of the Dangerous Drugs Ordinance, 1952, and punishable under section 5(3) of the said Ordinance. I dismissed the appeal but Mr. S. K. Lee who appeared for the appellant asked me to give my reasons. He also asked me to give what he described as a "ruling" on the meaning of the word "export" as it appears in the Dangerous Drugs Ordinance.

To deal with this last request first, the learned President, in view of the definition of the word 'export' contained in the Ordinance at section 2 followed the meaning assigned to it by normal English usage and held that before there could be any export, the goods must actually leave the territorial limits of the Federation. He followed the judgment of Taylor J. in *Public Prosecutor* v. *Lee Tuah Suah* [1] where the learned Judge considered the meaning of similar words in another statute. The learned President amended the charge to one of 'attempting to export' under section 33 of the Dangerous Drugs Ordinance because on the evidence, although the appellant's car had passed the Customs Station and was on its way along the Causeway when it was stopped, it had not reached the half way mark and the vehicle was still in Federation territory. The learned Deputy Public Prosecutor has not quarrelled with this, and has lodged no appeal against this amendment. It is not, therefore, open to me to give any "ruling" on this matter. The learned Deputy is clearly of the opinion that the learned President was right or he would have appealed. If the Customs find this ruling (which after all has been in force since 1948) of Taylor J. to be inconvenient they can ask the proper authorities to seek to have the law amended along the lines of section 79 of the Customs and Excise Act, 1952 (Cap. 44 Eliz. II) of the United Kingdom which devotes itself to the definition of the time of both import and export by land, sea and air. This might well be an excellent time to have the law altered if it is so desired as the Laws at present are in the process of consolidation.

The facts in this case are very simple and are not really in dispute. The appellant borrowed a car in Singapore at the request of one Tan Ah Tee who was not produced to give evidence, to go to Johore Bahru for a drink. They went to the Bar at the 3rd mile. The appellant, who made a statement from the dock, said that Tan Ah Tee took the car off for an hour and then when he came back they drove back to Singapore. On the way in Johore Bahru town three ladies asked them for a lift and they took them back with them. At the Customs' Gate the appellant's car was stopped and on his saying that he had nothing to declare, he was allowed to proceed on. After going a few yards out of the Customs' Station and on to the Causeway he was again stopped. The car was searched and smelt strongly of opium. 270 lbs. in weight of raw opium were found wrapped in oiled paper cleverly concealed under the seats and in the door panels. In the meantime Tan Ah Tee 'disappeared' among the crowd and the three ladies who had apparently come into Johore to buy lottery tickets also tried to disappear but were stopped by the Police. There is also some evidence that the appellant tried to drive off the car and was restrained by the Customs Officer. The President accepted this evidence which was corroborated by two other witnesses although it was not satisfactorily explained how this could have been done since the customs officer had taken the ignition key when the car was first stopped. The President was not prepared to disbelieve the policeman and the other customs officer who witnessed Suleiman bin Akil (P.W.1) trying to stop the car from driving off and I agree with him.

The only point in this appeal was whether or not *mens rea* is needed to establish an attempt to commit an offence where there is an absolute prohibition and even this is not really a necessary point to decide, because although the learned President found that there need be no *mens rea* for an attempt when the main offence is a statutory absolute prohibition which itself requires no guilty knowledge, there was overwhelming evidence from which he could and did find that the appellant well knew what he was attempting to export. There is no question at all but that the Dangerous Drugs Ordinance, 1952, section 5 imposes an absolute prohibition against the export of raw opium without certain licences. These licences had not been issued in this case and it was never alleged that they had. Where there is an absolute prohibition against exporting or importing a thing, it is no defence to prove that one had no knowledge of the existence of the subject matter of the import or export. It is merely mitigation of the offence. (See *dicta* of Storr J. in *Lim Eng Soon* v. *Public Prosecutor* [2]). But can one, in fact, attempt to do something if one does not know what one is doing? Generally speaking in an attempt there must be both *actus reus* and *mens rea*. There must be a deed

done which the law regards as marking the commission of the particular offence and there must be proof that the offender was actuated by the intention to go further and achieve a definite end which is a specific crime. The definition of an attempt to commit a crime in *Stroud's* Judicial Dictionary, 3rd Edn. is "an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted." In other words ".....a man cannot attempt to do what he does not intend, if he is able, to do" (*Russell* on Crimes, 11th Edn., p. 188). But all these references refer to a crime in the normal meaning of the word where there must be the *actus reus* and *mens rea* before it can be committed. The offence with which we are dealing is a statutory offence created for the general benefit of mankind in an attempt to halt the unrestricted import and export of Dangerous Drugs. If a person utterly innocently in possession of a dangerous drug in complete and blissful ignorance of what he is carrying is guilty of an offence if he exports it or imports it in ignorance of its very existence it does not seem repugnant to the normal English meaning of "attempt" to say that he attempts to export it while in his state of blissful ignorance he is walking through the customs barrier towards the boundaries of the territory of the Federation of Malaya. The word 'attempt' derives from the Latin "*attemptare*" and generally means to make an effort or endeavour to do or accomplish some action. The fact therefore that he did not know that he was making the effort to export or accomplish the exportation of the raw opium in view of the absolute prohibition contained in section 5 of the Dangerous Drugs Ordinance, would appear to be immaterial. I see nothing illogical in holding that where there is an absolute prohibition against the doing of an act there may also be an absolute prohibition against the making of an attempt and that a purely involuntary attempt is an offence. For that reason I uphold the decision of the learned President on that point, and dismiss the appeal. There was wisely no appeal against sentence.

Appeal dismissed.

LEE SZU YIN v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) October 12, 1961]

[J.B. — Criminal Appeal No. 26 of 1961]

Criminal Law and Procedure — Jurisdiction — Foreign actus reus.

Customs and Excise — Undervaluation and declaration — Customs Ordinance, 1952, ss.12(1) and (2), 129 (1)(a) and 136(1).

The appellant was manager of a company carrying on business as dealers in cotton goods in Singapore. He sold certain goods to four firms trading in the Federation amounting according to the invoices to $847. These goods and invoices were to be delivered in the Federation by the proprietor of a transport business in Singapore. In the course of transportation the goods were checked at Johore Bahru. The Customs Officer thought that there was an undervaluation and after investigations made by him he made his own assessment at $1,192.50, the difference in duty being $80.53. The appellant was subsequently charged under section 129(1)(a) and section 136(1) of the Customs Ordinance, 1952 and the proprietor of the transport business under section 129(1)(a) of the said Ordinance and both were found guilty — the appellant being fined $200 or one month's imprisonment and the proprietor of the transport business was cautioned and discharged under section 173A(ii)(a) of the Criminal Procedure Code. On appeal,

Held: (1) the Magistrate's Court at Johore Bahru had no jurisdiction to try the appellant because the *actus reus* took place in Singapore;

(2) the presumption under section 12(2) has been abundantly rebutted and for this reason also the appellant ought to have been acquitted;

(3) it was impossible to hold that there was any relationship of principal and agent between the appellant and the proprietor of the transport business.

Cases referred to:—

(1) *Macleod* v. *Attorney-General for New South Wales* [1891] A.C. 455, 458.

(2) *R.* v. *Oliphant* [1905] 2 K.B. 67.

(3) *R.* v. *de Marny* [1907] 1 K.B. 388.

CRIMINAL APPEAL.

Robert Hsieh for the appellant.

Syed Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: In the Magistrate's Court at Johore Bahru the appellant was charged, as manager of Kiauw Hin & Co. Ltd., Singapore, with the offence of making a Customs declaration through an agent which undervalued the goods declared, in contravention of section 129(1)(a) and section 136(1), and punishable under section 129(1) of the Customs Ordinance, 1952.

In the same Court one, Phang Chang Pew, who was alleged to have been the agent of the appellant, was also charged with the offence of making a declaration required by section 75 of the Customs Ordinance, 1952, which undervalued the same goods, in contravention of section 129(1)(a) and punishable under section 129(1) of the Ordinance.

Both the accused were tried jointly and found guilty. The appellant was sentenced to a fine of $200 or one month's imprisonment in default. Phang Chang Pew was cautioned and discharged under section 173A(ii)(a) of the Criminal Procedure Code. An order was also made for the confiscation of the goods.

The facts may be stated briefly. The appellant, a Shanghai man resident in Singapore, was manager of Kiauw Hin & Co. Ltd., a company carrying on business as dealers in cotton goods at 24 North Bridge Road, Singapore. On January 27, 1961, which was the date appearing on the company's invoices, 300 dozen cotton gloves, 14¾ dozen vacuum flasks and 120 dozen face towels were sold to four firms trading in the Federation. Their total value according to the invoices was $847.00. Phang Chang Pew was the sole proprietor of a transport business in Singapore. On January 30, 1961 he sent a